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No. 88-1181

In The

Supreme Court of the United States

October Term, 1988

CRYSTAL CUNNINGHAM Per Next Friend ROBERT RUBY CUNNINGHAM, and ASHLEY JOHNSON Per Next Friend, LARRY JOHNSON,

Petitioners,

vs.

HARRY J. BEAVERS, Superintendent of Schools Jacksonville Independent School District, MARY SUE BRUNO, Principal, Westside Kindergarten School, ROSA COOK, Teacher, Westside Kindergarten School, TONY BOLTON, Chairman, Jacksonville Independent School District Board of Trustees,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

(1) Was the Fifth Circuit correct in its holding that state tort and criminal remedies provide all the process that is due for excessive, unreasonable, and disproportionate public school corporal punishment, which does not rise to the level of substantive due process violation?

(2) Was the Fifth Circuit correct in its holding that corporal punishment is rationally related to a legitimate state purpose and does not violate the Equal Protection Clause of the Fourteenth Amendment?

(3) Was the Fifth Circuit correct in its holding that the Texas statute authorizing the use of corporal punishment does not violate the Equal Protection Clause or the Due Process Clause of the Fifth and Fourteenth Amendments?

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OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 858 F.2d 269 and is attached to Petitioners' Petition as Exhibit A at page A-1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("the Petition").

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Texas Codes Annotated, 1973 Revision, Penal Code, Vol. 1
Section 9.62, Educator-Student

"The use of force, but not deadly force, against a person is justified:

(1) if the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and
(2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group."

COUNTERSTATEMENT OF THE CASE

Petitioners, Crystal Cunningham and Ashley Johnson, filed suit in the United States District Court for the Eastern District of Texas alleging violation of their Fifth

and Fourteenth Amendment substantive and procedural due process rights and for violation of the equal protection clause under 42 U.S.C. Section 1983, and under 42 U.S.C. Section 1985 for conspiracy to intimidate from testifying in federal court. Petitioners individually named and sued the Respondents, alleging that the teacher, principal, superintendent and chairman of the Board of Trustees violated the Petitioners' constitutional rights under 42 U.S.C. Section 1983 by the use of disciplinary corporal punishment. Petitioners' complaint alleged that Respondents' acts in administering corporal punishment were excessive, brutal, disproportionate to the circumstances, shocking to the conscience and constituted intentional disregard for Petitioners' rights and their physical and emotional well being. (*See* Petition, p. E-3)

On February 29, 1988, the District Court granted Respondents' Rule 12(b)(6) F.R.C.P., Motion to Dismiss for failure to state a claim on all counts, considering itself bound by Fifth Circuit precedent in regard to due process. *Coleman v. Franklin Parish Board*, 702 F.2d 74 (5th Cir. 1983); *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (*en banc*) *aff'd on other grounds*, 430 U.S. 651 (1977); *Woodard v. Los Fresnos*, 732 F.2d 1243 (5th Cir. 1984). (*See* Petition, p. C-2)

The equal protection claim was dismissed on the grounds that corporal punishment is rationally related to a legitimate state purpose. Various state pendent tort claims were dismissed with the above.

Petitioners perfected their appeal to the Court of Appeals for the Fifth Circuit in timely fashion. (*See* Petition, p. E-5) The appeal to the Fifth Circuit was premised

upon violation of the substantive due process liberty interest and the Equal Protection Clause.

In denying the liberty interest claim, the Court of Appeals for the Fifth Circuit stated that even if the force is unreasonable and/or disproportionate, the availability and sufficiency of state tort or criminal remedies are sufficient to afford due process to the student. The Fifth Circuit upheld the District Court's dismissal of the Equal Protection claim based on the Texas statute allowing corporal punishment, as the statute was rationally related to a legitimate state purpose.

REASONS FOR DENYING THE WRIT

I. STATE TORT AND CRIMINAL REMEDIES PROVIDE ALL THE PROCESS THAT IS DUE FOR EXCESSIVE, UNREASONABLE AND DISPROPORTIONATE PUBLIC SCHOOL CORPORAL PUNISHMENT, WHICH DOES NOT RISE TO THE LEVEL OF A SUBSTANTIVE DUE PROCESS VIOLATION.

This Court has had occasion to consider the constitutional aspects of corporal punishment in the case of *Ingraham v. Wright*, 430 U.S. 651 (1977). The facts of *Ingraham v. Wright* are similar to the facts before the Court in that the petitioners filed their suit under 42 U.S.C. Sections 1981 through 1988 for damages, alleging violation of their constitutional rights resulting from their subjection to disciplinary corporal punishment. Ingraham was subjected to more than twenty licks with a paddle, causing a hemotoma requiring medical attention and keeping him out of school for several days. Andrews was struck on his arm, depriving him of the full use of his

arm for a week. In *Ingraham v. Wright*, this Court expressly stated that it had no occasion to consider "whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause", 430 U.S. 651, 679, n.47 (1977). The Court refused certiorari as to whether "the infliction of severe corporal punishment upon public school students [is] arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment[.]", *Id.* at 659, n.12. Therefore, the Fifth Circuit refusal "to look at each individual incidence of punishment to determine if it had been administered arbitrarily or capriciously" was left to stand. *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976) (en banc), *aff'd on other grounds*, 430 U.S. 651 (1977). The Fifth Circuit stated:

> We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular incidence of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.

Id. at 917.

This Court recognized a liberty interest to be free from bodily restraint and punishment without due process of law, thus recognizing a right to procedural due process in the application of corporal punishment in public schools, although recognizing that "there is a 'de

minimis' level of imposition within which the Constitution is not concerned". *Ingraham*, 430 U.S. 651, 674. However, this Court did not recognize a substantive liberty interest with respect to the application of corporal punishment. In the procedural realm, the traditional common law remedies were found to be "fully adequate to afford due process". *Id.* at 673. This Court's holding that "common-law constraints will . . . effectively remedy and deter" the anticipated "low incidence of abuse", *Ingraham, supra*, 670, 678, n.46, strongly suggests the contrary conclusion that excessive corporal punishment is not an element of the substantive content of the liberty interest. The adequacy of available post-corporal punishment state tort remedies to address any abuses that do occur supports this conclusion, just as this Court found these remedies to be adequate to satisfy the procedural due process requirement specified in *Ingraham*.

The Fifth Circuit Court of Appeals' refusal to review individual incidents of corporal punishment keeps the federal judiciary from being unnecessarily embroiled in local matters of school discipline. As this Court clearly stated in *Paul v. Davis*, 424 U.S. 693, 701 (1976), the Fourteenth Amendment should not become "a font of tort law". This Court's concern was reiterated in *Daniels v. Williams*, 474 U.S. ___, 106 S.Ct. 662 (1986), when this Court stated its concern that elevating simple torts to the level of constitutional deprivations would trivialize the Constitution.

This Court in *Ingraham* recognized that corporal punishment has evolved over the history of this country as a privilege to be inflicted reasonably where applicable in a public school, and that it was reviewing the legislative

judgment "rooted in history and reaffirmed in the laws of many States, that corporal punishment serves important educational interests." *Ingraham*, 430 U.S. at 682. This Court implied that it intended the review of corporal punishment to be left on a local level and not rise to the level of federal review.

> Assessment of the need for, and the appropriate means of maintaining school discipline is committed generally to the discretion of school authorities subject to state law. "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines School District*, 393 U.S. 503, 507 (1969).

Id. at 682-683.

The Fifth Circuit, in the decision before this Court, stated that if the corporal punishment was unreasonable and/or disproportionate to the offense, the Plaintiffs would be entitled to relief under Texas common law. (*See* Petition A-8) In *Parratt v. Taylor*, 451 U.S. 527, 545 (1981), this Court held that the Nebraska state tort procedures provided sufficient remedies to persons who had suffered tortious loss at the hands of the state, and cautioned against finding in "every alleged injury which may have been inflicted by a state official acting under the 'color of law' a violation of the Fourteenth Amendment cognizable under Section 1983."

Texas laws provide sufficient "post-punishment remedies" to the aggrieved student. In looking to the laws of the State of Texas, it has been recognized by the Fifth Circuit Court of Appeals and Texas courts that Texas provides a student with sufficient common law

remedies in the form of criminal and tort remedies for the use of excessive or unreasonable punishment or force. *Woodard, supra; Hopkins v. Spring Independent School District,* 736 S.W.2d 617 (Tex. 1987).

In view of this Court's opinion set forth in *Ingraham v. Wright,* the Fifth Circuit correctly concluded that the corporal punishment inflicted upon Crystal Cunningham and Ashley Johnson did not create a substantive due process violation. The punishment of Ashley Johnson and Crystal Cunningham was certainly no more severe than that of the petitioners in *Ingraham v. Wright.* If this Court is inclined to impose a substantive due process requirement on the administration of corporal punishment, under the facts as presented in Petitioners' Petition for Writ of Certiorari, it was presented no less compelling a set of facts in *Ingraham v. Wright* when the same question was presented and certiorari denied. Therefore, the opinion of the Fifth Circuit in this case, with regard to substantive due process should be allowed to stand.

Additionally, in affirming the opinion of the Fifth Circuit that the facts of this case do not rise to the level of due process, the Petitioner has no rights for which he has been deprived under the First Amendment and the Fifth Amendment of the Constitution. Under the jurisprudence set by this Court, it is apparent that the allegations of Petitioners, as plead, have alleged no facts and therefore can prove no set of facts in support of their claims for deprivation of substantive due process that would provide a basis for relief under Section 1983.

II. CORPORAL PUNISHMENT IS RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fifth Circuit correctly denied Petitioners' Equal Protection claim. Although this Court has upheld the common law privilege of inflicting corporal punishment on school children as a means of discipline in education, Petitioners would have the Court reverse its holding in light of their statements and studies cited in Petitioners' Petition.

In order to establish a claim under Section 1983, Petitioners are required to allege specific facts to demonstrate Petitioners have been deprived or will be deprived of a right secured by the Constitution or laws of the United States and that such deprivation was caused by a person acting under the color of law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 1440 (1970). In that connection, in seeking to establish a claim under Section 1983 for deprivation of equal protection of the laws, it must be remembered that the Equal Protection Clause of the Fourteenth Amendment, in and of itself, confers no substantive rights and creates no substantive liberties. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

The purpose and function of the Equal Protection Clause is to simply act as a limit on state legislative action against arbitrary or invidious discriminatory classifications or distinctions. Petitioners have failed to allege specific facts demonstrating that Respondents have, pursuant to some improper classification or distinction,

through their conduct, caused the denial of equal protection of the laws in connection with a specifically identifiable federal constitutional right or guarantee. Petitioners' allegations regarding denial of equal protection are vague and conclusory statements which are insufficient to state a claim under Section 1983. Additionally, Petitioners' allegations fail to allege or identify any improper classification under the state laws set forth therein.

Petitioners cannot prevail under the "strict scrutiny" test of an equal protection violation, without the denial of a fundamental right. (*See Rodriguez, supra; Palko v. Connecticut*, 302 U.S. 319 (1937). Petitioners have recognized the fact that no cases have ever held that children are a suspect class. (*See* Petitioners' Brief to the Fifth Circuit p. 16) The Fifth Circuit likewise declined to hold that children are a suspect class. (*See* Petition, A-9). Next, Petitioners seek to create an "intermediate" scrutiny class making children an "at risk" group. The Fifth Circuit has correctly held that intermediate scrutiny has only been applied in classifications based on gender, legitimacy or alienage. *Plyler v. Doe*, 457 U.S. 496 (1981); *Craig v. Boren*, 429 U.S. 190 (1976), *reh'g denied*, 429 U.S. 1124 (1977); *Lalli v. Lalli*, 439 U.S. 259 (1978). Therefore, the Petitioner is left with an equal protection review on a "rational basis" test which provides the minimum level of judicial evaluation and review of legislation challenged on equal protection grounds.

> In the equal protection context, if the state's purpose is found to be legitimate, state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship not difficult to establish.

Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 882 (1983), *reh'g denied*, 471 U.S. 1120 (1985). An equal protection challenge will not prevail so long as "the question of rational relationship is 'at least debatable' ". *Id.* If the evaluation of a legislation reveals any conceivable state purpose that could be considered to be served by a classification, it must be upheld. *McGowan v. Maryland*, 366 U.S. 420 (1961).

In applying the rational basis test to the legislative relationship between the statute and laws of this state permitting corporal punishment, this Court should rely heavily on the evaluations of the goals and objectives of corporal punishment stated in *Ingraham v. Wright*, 525 F.2d at 916. The Fifth Circuit explained:

> Certainly, maintenance of discipline and order in public schools is a prerequisite to establishing the most effective learning atmosphere and as such is a proper objective for state and school board regulation. Without the existence of disciplinary sanctions for misbehavior, students who desire to learn would be deprived of their right to an education by the more disruptive members of their class.

Id. at 916-17. Although Petitioners cite empirical research disagreeing with the benefit of the use of corporal punishment in maintaining such discipline, Respondents could cite the Court to authorities who would hold otherwise. However, in light of the standard that a rational relationship to a legitimate state purpose is all that is needed to uphold legislation, Petitioners' cited studies should not be sufficient to cause this Court to change its position that corporal punishment is not violative of equal protection. The Fifth Circuit has correctly held that the invalidation of corporal punishment would require

this Court to ignore its decision in *Ingraham v. Wright* which presupposes that there is a rational relationship between corporal punishment and maintaining discipline in public schools.

III. THE TEXAS STATUTE AUTHORIZING CORPORAL PUNISHMENT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OR THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The Texas Penal Code provides authority for the use of corporal punishment:

> The use of force, but not deadly force, against a person is justified:
>
> 1. If the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and
>
> 2. When and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group.

TEX. PENAL CODE ANN. Section 9.62 (Vernon 1973). The Fifth Circuit correctly held that, based on the foregoing discussion of the application of the "rational basis" test, the Texas legislature had a rational basis for its legislation in that this statute is rationally related to the legitimate state purpose of maintaining discipline in public schools, and therefore, is not violative of the Due Process or Equal Protection Clauses of the Fourteenth Amendment.

The Fifth Circuit also correctly held "that the concerns voiced by [Petitioners] and the wealth of empirical

research they bring to the attention of the Court are more properly brought to the attention of the Texas legislature." (*See* Petition, A-11).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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